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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 405

BERNARD J. SEMEL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	4
Conclusion	7
Appendix A	8
Appendix B	11

Citations

Travis v. *United States*, 1960, 364 U.S. 631, 636, 81 S. Ct. 358, 5 L.Ed. 2d 340	7
United States v. *Anderson*, 1946, 328 U.S. 699, 66 S.Ct. 1213, 90 L.Ed. 1529	4
United States v. *Cores*, 1958, 356 U.S. 405, 78 S.Ct. 875, 2 L.Ed. 2d 873	6
United States v. *Jackalow*, 1861, 66 U.S. 484	4
United States v. *Lombardo*, 1916, 241 U.S. 73	5
Constitution of the United States:	
Fifth Amendment	4
Sixth Amendment	4, 6, 7
Statutes:	
United States Code Annotated:	
Title 18, Section 659	6
Title 18, Section 836	2, 3, 4, 5, 6
Title 18, Section 1073	6
Title 18, Section 3232	6
Title 18, Section 3237(a)	5
Title 28, Section 1254(1)	2

Page

Code of Virginia of 1950
Title 59, Section 214 2-3
Federal Rules Criminal Procedure
Rule 21(b) 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bernard J. Semel, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on the 31st day of May, 1965. (R. Vol. 1, p. 18)

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit which is not yet reported, is printed in Appendix A, page 8-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 31, 1965 (R. Vol. 1, p. 18). By order of the Chief Justice on June 16, 1965, the time for filing a petition for certiorari was extended to July 30, 1965. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a criminal information brought in an improper district vested the District Court of that improper district with authority to enter a judgment of conviction on a plea of guilty.

STATUTES INVOLVED

1. Title 18 U.S.C.A. § 836 provides as follows:

> § 836. Transportation of fireworks into State prohibiting sale or use.—
>
> Whoever, otherwise than in the course of continuous interstate transportation through any state, transports fireworks into any state, or delivers them for transportation into any State, or attempts so to do, knowing that such fireworks are to be delivered, possessed, stored, transhipped, distributed, sold, or otherwise dealt with in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks, shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *"

2. Title 59, § 214, 1950 Code of Virginia, as amended:

> *"When sale, use, etc., of fireworks unlawful.*—Except as otherwise provided in this chapter, it shall be unlawful for any person, firm or corporation to sell, offer for sale, expose for sale, or to buy, use ignite or

explode any firecracker, torpedo, skyrocket, or other substance or thing, of whatever form or construction, containing nitrates, chlorates, oxalates, sulphides of lead, barium, antimony, nitro-glycerine, phosphorus or any other explosive or inflammable compound or substance, and intended, or commonly known, as fireworks. (1948, p. 591; Michie Suppl. 1948; § 4722 (4a).)"

STATEMENT

This petition challenges the decision of the Fourth Circuit Court of Appeals affirming an order of the District Court for the Eastern District of Virginia denying petitioner's motion to vacate a judgment of conviction (Appendix B, p. 12; R. Vol. 1, p. 32) for lack of jurisdiction and other reasons not pertinent here.

The petitioner was charged by an eighteen count information with violating 18 U.S.C.A. § 836 for having feloneously caused to be transported from Maryland into the Eastern District of Virginia, certain fireworks, knowing that they were to be delivered and sold in violation of the laws of Virginia. (R. Vol. 1, pp. 1-9)

The government's bill of particulars revealed that with respect to at least three counts, Nos. 10, 11 and 12, the feloneous deliveries were made to a customer in Stephens City, which is located in the Western District of Virginia. (Appendix B, pp. 12-13; R. Vol. 1, pp. 20-23)

On September 22, 1964, the petitioner entered a plea of guilty to Count 10 of the information (Appendix B, pp. 13-14). The remaining 17 counts were dismissed. (Appendix B, pp. 13-14, R. Vol. II, pp. 2-5).

On December 8, 1964, petitioner received a sentence of six months imprisonment, five months of which were suspended. (Appendix B, p. 14, R. Vol. IV, p. 71)

On December 14, 1964, petitioner filed a motion to vacate the sentence. (Appendix B, p. 12) The motion was denied. (Appendix B, p. 14; R. Vol. V, p. 39)

On Appeal the Fourth Circuit Court of Appeals affirmed the District Court. (Appendix A, pp. 8-10; R. Vol. VII, pp. 14-16)

REASONS FOR GRANTING THE WRIT

The denial of petitioner's motion to vacate the sentence passed by the court on a void information has deprived petitioner of his liberty without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

The record shows (bill of particulars) that the offense charged and upon which sentence was passed was committed in a district other than the one in which the information was filed. Crimes against the United States must be tried in the district in which the offense was committed. *United States* v. *Jackalow*, 1861, 66 U.S. 484, 486; also, Sixth Amendment to the Constitution of the United States.

The provisions of 18 U.S.C.A. § 836 consider that the crime is committed where the fireworks were delivered for intended sale. The *locuus delicti* must be determined from the nature of the offense alleged and the location of the act constituting it. *United States* v. *Anderson*, 1946, 328 U.S. 699, 703; 66 S.Ct. 1213, 1216, 90 L.Ed. 1529.

The command of the Sixth Amendment [1] is geographic. The geography described is the district within which the offense is committed. It is important here to determine whether an offense under 18 U.S.C.A. § 836 is capable

---

[1] Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a * * * trial by an impartial jury of the State and district wherein the crime shall have been committed, * * *."

of commission only at the place of delivery or whether it may be committed in more than one place as suggested by the Court of Appeals opinion. The Circuit Court observed that "defendant did not move under Rule 21(b) to transfer his case to the Western District of Virginia." (Appendix A, p. 10)

This presupposes that an offense under 18 U.S.C.A. § 836 could be committed in two or more districts. Since this was not possible, petitioner was powerless to invoke the privilege for transfer accorded by Rule 21(b), F.R. Cr.P. This was the crux of the Circuit Court's erroneous opinion resulting in a denial of petitioner's liberty without due process of law.

The gist of the offense was that petitioner transported certain fireworks from Maryland, intended for and were delivered to the Western District of Virginia for a use prohibited by the laws of the State of Virginia. The descriptive words in 18 U.S.C.A. § 836 are: "delivered, possessed, stored, distributed and sold", all having reference to the prohibited use of fireworks contrary to State law. All of the activities of the petitioner connoted by those verbs took place only at Stephens City, Virginia, in the Western District of Virginia. Thus none of the principles of the multi-venue statute, 18 U.S.C.A. § 3237(a), were applicable where the place of the offense was so clearly set out in the statute itself as it is here. The distinction between a continuing offense and that contemplated by one such as 18 U.S.C.A. § 836 was clearly drawn by this Court in *United States* v. *Lombardo*, 1916, 241 U.S. 73, 77-78:

> "But the law, being usually practical, does not regard every crime as continuous for the purpose of jurisdiction. * * * for practical purposes it usually suffices to punish where the actor began, or where the subject suffered the intended result."

There is nothing in the legislative history of 18 U.S.C.A. § 836 to show an intention on the part of Congress to depart from the Sixth Amendment's command that trials shall be had in the "state and district wherein the crime shall have been committed." It would seem that the contrary was the purpose and effect of the provisions of 18 U.S.C.A. § 836.

This offense [18 USCA § 836] is not unlike many statutory offenses where the language itself specifies the place of prosecution. See, e.g. 18 U.S.C.A. § 659 [theft of goods in interstate commerce]; 18 U.S.C.A. § 1073 [flight to avoid prosecution]; 18 U.S.C.A. § 3232 [mailing threatening communications]. See, *United States* v. *Cores*, 1958, 356 U.S. 405, 407, 78 S.Ct. 875, 877, 2 L.Ed.2d 873.

The offense under 18 U.S.C.A. § 836 here was completed only after the delivery was made for purposes of a sale. This occurred in the Western District of Virginia, contrary to the allegations in the information, which recited the "Eastern District of Virginia." The information was void on its face. There was no way to cure it. It was in the Western District of Virginia that Congress says that the crime was "committed" in the sense in which that term is employed in the Sixth Amendment.

Venue should not be made to depend upon the government's lethargy, particularly since it knowingly allowed petitioner to plead guilty to a void information, based on a statute in which Congress had so carefully indicated the *locus* of the crime. If petitioner transported the fireworks from Maryland into the State of Virginia and en route had a change of heart, recalling the shipment to Maryland, certainly the circuitous route through the State of Virginia would not have constituted an offense under 18 U.S.C.A. § 836.

Thus, when a place was specifically designated where delivery was to be made, prosecution for making it lay

only at that place and no other. See *Travis* v. *United States*, 1960, 364 U.S. 631, 636, 81 S.Ct. 358, 361-362, 5 L.Ed.2d 340. Only the single act of delivering the fireworks for sale at a particular place was intended to be penalized under the statute here. It must be concluded that venue lay only in the Western District of Virginia. See, Sixth Amendment to the Constitution of the United States.

CONCLUSION

It is respectfully submitted that the foregoing petition for a writ of certiorari should be granted.

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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9810.

UNITED STATES OF AMERICA,
Appellee,

versus

BERNARD J. SEMEL,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued May 7, 1965. Decided May 31, 1965.)

Before BOREMAN and J. SPENCER BELL, Circuit Judges, and BUTZNER, District Judge.

Joseph J. Lyman (Josiah Lyman on brief) for Appellant, and Plato Cacheris, First Assistant United States Attorney, (C. V. Spratley, Jr., United States Attorney, on brief) for Appellee.

PER CURIAM:

This is an appeal by the defendant, Bernard J. Semel, from an order of the district court denying his motions to vacate a judgment of conviction for lack of jurisdiction and to permit him to withdraw his guilty plea.

The defendant was charged by an information containing eighteen counts with violating 18 U.S.C.A. § 836 by having feloniously caused to be transported from Maryland into Virginia certain fireworks, knowing that they were to be delivered and sold in violation of the laws of Virginia.[1]

On September 22, 1964, the defendant entered a plea of guilty to count 10 of the information. After considerable questioning of the defendant, the court satisfied itself that the plea was voluntarily made and accepted it, and thereafter, on motion of the United States, the remaining seventeen counts were dismissed. Sentencing was postponed until a later date.

On December 8, 1964, Semel received a sentence of six months imprisonment, five months of which was suspended. On December 14, 1964, the defendant filed motions to withdraw his guilty plea and to vacate his sentence. Both motions were denied.

The record in this case reveals a guilty plea, voluntarily made with the assistance of retained counsel seven months after the defendant was arraigned. At a sentencing hearing three months after the plea was accepted, the defendant candidly admitted all the essential elements of the crime with which he had been charged. By the provisions of Rule 32(d) of the Federal Rules of Criminal Procedure, the withdrawal of a guilty plea after the im-

[1] Most of these counts dealt with fireworks transportation to persons located in the Eastern District of Virginia; counts 10-12 dealt with deliveries to one Gustave Michon of Stephens City, which is located in the Western District of Virginia.

position of sentence is permissible when, in the discretion of the trial judge, such a withdrawal is necessary "to correct manifest injustice." It is to be expected, however, that such a procedure will be appropriate only in extraordinary cases. *United States* v. *Roland*, 318 F.2d 406, 409 (4 Cir. 1963). In the circumstances of this case, the district judge clearly did not abuse his discretion in denying the defendant's motion to withdraw his plea. *Klingstein* v. *United States*, 217 F.2d 711, 712-13 (4 Cir. 1954).

The defendant's contention that the court was without jurisdiction is without merit, for 18 U.S.C.A. § 3231 gives the district courts of the United States jurisdiction over "all offenses against the laws of the United States." Under Rule 18 of the Federal Rules of Criminal Procedure, the proper venue for the offense charged in count 10 of the information may have been the Western District of Virginia. However, even after having been furnished with a bill of particulars which named Stephens City, Virginia, as the terminal point of the shipment charged to be illegal in count 10, the defendant did not move under Rule 21 (b) to transfer his case to the Western District of Virginia. Instead he entered a plea of guilty to the offense charged, and under Rule 12(b) (2), his actions constituted a waiver of any defect in venue which existed.

For the foregoing reasons, the judgment of the district court is affirmed.

Affirmed.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Criminal Information No. 4099

UNITED STATES OF AMERICA

v.

BERNARD J. SEMEL

THE UNITED STATES ATTORNEY CHARGES: * * *

COUNT TEN

THE UNITED STATES ATTORNEY FURTHER CHARGES:

That on or about the 24th day of July, 1962, BERNARD J. SEMEL, otherwise than in the course of continuous interstate transportation through the State of Virginia, unlawfully and knowingly did transport and did wilfully cause to be transported and did deliver for transportation 4 cartons containing 5,760 cherry bomb fireworks, that is, from Brandywine, Maryland, into the State of Virginia in the Eastern District of Virginia, and he then knew that said fireworks were to be delivered, possessed, stored, distributed and sold in a manner and for a use prohibited by the laws of the State of Virginia specifically prohibiting and regulating the use of fireworks, (Title 59, Section 214, 1950 Code of Virginia, as amended) (In violation of Title 18, United States Code, Section 836; Title 18, United States Code, Section 2)

* * * *

[Caption Omitted]

MOTION TO VACATE JUDGMENT AND TRANSFER CASE TO WESTERN DISTRICT OF VIRGINIA

Defendant moves the Court to vacate the judgment of conviction and transfer the case to the United States District Court for the Western District of Virginia.

For reasons defendant says that the transaction to which Count 10 has reference concerned a shipment of fireworks from the District of Maryland to Stephens City, which lies in Frederick County, Virginia. Frederick County lies outside the jurisdiction of this Court and no removal proceedings from the Western District of Virginia have been commenced.

This Court was without jurisdiction to pass judgment on the charges alleged in the information, particularly to Count 10.

WHEREFORE, defendant prays the judgment be vacated and the case transferred to the Western District of Virginia.

[Certificate of Service December 14, 1964]

[R. Vol. I, pp. 20-23]

[Caption Omitted]

BILL OF PARTICULARS

Comes now the United States of America by Plato Cacheris, First Assistant United States Attorney for the Eastern District of Virginia, and answers the defendant's Motion for Bill of Particulars as follows:

* * * *

10. In Count X of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

11. In Count XI of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

12. In Count XII of the indictment the person referred to is Gustave Michon, Stephens City, Virginia. The government intends to prove that the defendant Semel caused fireworks to be transported by William Wegand, 29 Williams Drive, Brandywine, Maryland.

PROCEEDINGS

September 22, 1964

* * * *

MR. HOWARD: We previously entered a plea of not guilty which the defendant would like to withdraw at this time as to Count 10 of the indictment and enter a plea of guilty to Count 10 of the indictment.

* * * *

MR. HOWARD: Yes, sir.

THE COURT: Mr. Semel, your counsel has just advised the Court that you wish to withdraw your previous plea of not guilty to Count 10 of the indictment pending against you and to tender a plea of guilty to that count; is that correct?

MR. SEMEL: Yes, sir.

* * * *

THE COURT: The Court is satisfied that the defendant thoroughly understands the nature of the charge and that the guilty plea is voluntarily made, and it is, therefore, accepted.

What is the government's position in reference to the other counts in the indictment?

MR. CACHERIS: The government moves to dismiss them, your Honor.

THE COURT: Upon the motion of the United States District Attorney the other 17 counts in the indictment, that is 1 through 9, inclusive, and 11 through 18, inclusive, are dismissed. You stand discharged and released insofar as those charges are concerned.

* * * *

Proceedings, December 8, 1964

[R. Vol. IV, p. 71]

* * * *

COURT * * *

In the case of Bernard Jacob Semel upon his plea of guilty and finding of guilty as to Count 10, it is the judgment of the Court that he be committed to the custody of the Attorney General for confinement for a period of six months, five months of which will be suspended.

* * * *

Proceedings, December 15, 1964.

[R. Vol. V, p. 39]

* * * *

THE COURT This is denial of all these motions you made.

* * * *